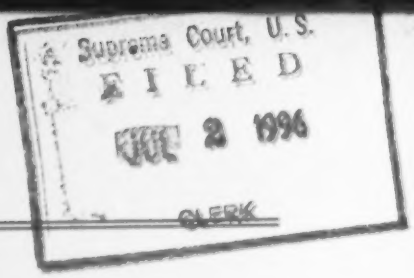

No. 95-1947

In The

Supreme Court of the United States

October Term, 1995

VALMET OY,

Petitioner,

v.

LYNDA ALDY, JANET WALKER, MARTHA ANN BUGGS MALONE, MIA MALONE, KEITH MALONE AND MARCUS MALONE,

Respondents.

and

VALMET PAPER MACHINERY, INC.,

Petitioner,

v.

KENNETH AND ELMIRA BROWN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petition for writ of certiorari is a frivolous case which does not engage the jurisdiction of this Court?

2. Is proof required beyond uncontroverted evidence that a foreign sovereign manufactured, designed, solicited, sold, assembled, installed, and guaranteed a defective paper winder machine which seriously injured plaintiff/respondent at the Moss Point, Mississippi, International Paper Company plant in order to establish the existence of an exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a)(1993), 28 U.S.C. § 1605(a)?

LIST OF INTERESTED PARTIES

1. Kenneth Brown, Plaintiff/Respondent
2. Elmira Brown, Plaintiff/Respondent
3. Paul S. Minor, Counsel for Plaintiff/Respondent
4. Mark D. Lumpkin, Counsel for Plaintiff/Respondent

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered opinions reported as *Aldy v. Valmet Oy*, 74 F.3d 72 (5th Cir. 1996), and *Brown v. Valmet-Appleton, Inc.*, 77 F.3d 860 (5th Cir. 1996). These opinions are not in direct conflict with any other appellate court decisions, and specifically the decision of the United States Court of Appeals for the Second Circuit in *In Re: Air Crash Disaster Near Warsaw, Poland*, 716 F.Supp. 84 (E.D.N.Y. 1989), *rev'd Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990), or the decision of the United States Court of Appeals for the Ninth Circuit in *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), as urged by petitioner.

JURISDICTION AND FEDERAL STATUTORY PROVISIONS

Plaintiffs/respondents would show that a frivolous case does not engage the jurisdiction of the Court. *Beauchamp v. Sullivan*, 21 F.3d 789 (7th Cir. 1994) *citing Bell v. Hood*, 327 U.S. 678, 682-683, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *Crowley Cutlery v. United States*, 849 F.2d 273 (7th Cir. 1988). Given the frivolous nature of this petition, plaintiffs/respondents object to all recitations made by Valmet Paper Machinery, Inc. ("VPI") concerning jurisdiction over this appeal. Plaintiffs/respondents request that VPI and its attorneys be held personally liable for just damages, double costs, expenses, and attorneys' fees

because VPI and its counsel have unreasonable and vexatiously multiplied the proceedings in this case. 28 U.S.C. § 1927.

STATEMENT OF THE CASE

Perhaps because of its impotent position,[1] petitioner's statement of the case confuses, omits and misstates numerous material facts. On or about August 1, 1990, the respondent, Kenneth Brown, a resident of Richton, Mississippi, was employed by International Paper Company ("IP") in Moss Point, Mississippi, as an operator. On this date, Mr. Brown was working on a KL-1000 V-Base paper winder designed, manufactured, sold, assembled, and installed at the Moss Point, Mississippi, paper mill by the petitioner VPI. Because of serious design defects with the VPI paper winder, Mr. Brown's right hand, wrist, and arm were viciously pulled into the paper winder degloving his right hand and mangling and crushing his right arm.

On or about July 6, 1993, the respondents filed the subject product liability action against VPI and other defendants asserting the paper winder was defectively manufactured, defectively designed, and lacked sufficient warnings, instructions, and safety devices.

VPI never answered the complaint. On or about October 22, 1993, VPI filed a motion to dismiss asserting

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[1] During oral argument, Judge Edith Jones admonished petitioner's counsel that its appeal was very weak. (*See* Transcript of oral argument).

that it was immune from suit in the United States, and not subject to the jurisdiction of the United States District Court under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1992). This was the first time that plaintiffs were apprised that VPI considered itself to be a foreign sovereign within the meaning of the FSIA. In response thereto, the plaintiff/respondents sustained their burden of proof by presenting substantial evidence that conclusively establishes that VPI's actions came within several specifically enumerated exceptions to the FSIA (28 U.S.C. §§ 1605(a)(1), (2) and (5)). (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38).[2]

Because VPI offered absolutely no evidence to rebut plaintiffs' claims, it is uncontradicted that VPI designed, manufactured, installed, assembled, sold, guaranteed and

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[2] Of particular interest is VPI's response to request for admissions wherein it admitted that it participated in the design, installation, assembly and sale of the subject paper winder (R. 714-22); the specific design defects identified by plaintiff/respondent's expert, Dr. Charles Benedict (R. 689-91); that VPI guaranteed and warranted the winder at issue (R. 95-99); that VPI by contract agreed "to comply with the workers' compensation laws of the state in which the work is being performed", assumed liability for all damage or injury, agreed to obtain liability and property damage insurance for "claims for property damage, personal injury or accidental death", agreed to indemnify and save harmless plaintiffs/respondents' employer and intervenor, International Paper Company, *and its employees* against any loss, damage, injury or expense, waived immunity regarding any suit by International Paper Company, and expressly represented that it would comply with all local, state and federal rules, regulations and requirements in its production of goods, equipment and services (R. 113).

assumed liability for all damage or injury caused by its paper winder, agreed to obtain liability and property damage insurance for claims for personal injury, agreed to indemnify and hold IP harmless, expressly waived any immunity from suit, expressly represented that it would fully comply with all applicable rules, regulations and requirements in its production of goods, equipment and services, provided supervisors to oversee the installation of the product, and other matters contained in the record. (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38). These activities clearly bring VPI within the enumerated exceptions to the FSIA, 28 U.S.C. § 1605(a).

The district court, after considering the ample evidence before it, determined that: "At the time of the accident, Mr. Brown was working on a KL-1000 V winder which, from the documents submitted, was designed, manufactured, and sold at the Moss Point, Mississippi, mill by defendants VPI and VAI [Valmet-Appleton, Inc.]." (R. 729). Continuing, the district court stated: "[C]learly the commercial activities exception applies and [VPI's] motion should be denied." (R. 730-731).

The matter was then appealed to the United States Court of Appeals for the Fifth Circuit which, after oral argument, affirmed the district court's findings.

VPI then petitioned for certiorari to this Court, misrepresenting that a conflict existed between the Fifth Circuit's decision in *Brown* and *Aldy*, and the Ninth Circuit's decision in *Joseph v. Office of the Consulate General, supra*, and the Second Circuit's decision in *In re: Air Crash Disaster Near Warsaw, Poland, supra.*

CORRECTION OF MISSTATEMENTS IN THE PETITION

The opinions of the district court and the United States Court of Appeals for the Fifth Circuit correctly sets forth the facts of this case. These opinions accurately depict the fact that plaintiffs/respondents, through their complaint and through information derived from interrogatories, presented ample evidence that VPI was involved in the sale, production, distribution and/or installation of the paper winder which caused plaintiff/respondent's injuries. "VPI has received fair notice of the activities upon which the subject matter jurisdiction of the district court is premised." (*See* App. 17A).

Pursuant to the United States Supreme Court Rule 15.2, plaintiffs/respondents bring the following misstatements of fact contained in the petition to the Court's attention. Respondents respectfully direct this Court's attention to the record before it and the appellate court's opinion and request that this Honorable Court recognize the blatant misrepresentations made by VPI.

Petitioner misrepresents to this Court that evidence was not produced by plaintiffs/respondents to prove the applicability of an FSIA exception. (Petition p. 14). This allegation is utterly untrue. Plaintiffs/respondents produced abundant evidence which proved the applicability of FSIA exceptions that the petitioner chose not to rebut. (R. 87-183; 208-13; 216-17; 220; 226; 236-37; 464-68; 486-538; 542-72; 637-40; 674-95; 714-21; 735-38).

Petitioner also misleads the Court when it states that "plaintiffs failed to identify with any specificity the facts upon which their claim against VPI – as opposed to their

claims against the non-foreign sovereign defendants – was based. . . . " (Petition p. 18). Plaintiffs/respondents presented unrebutted evidence which established a direct nexus between VPI's activities and Mr. Brown's horrible injuries. Furthermore, despite VPI's refusal to engage in discovery, plaintiffs produced expert testimony which identified numerous specific design flaws attendant in VPI's paper winder which caused Mr. Brown's injuries. (R. 689-693). VPI's allegations that plaintiffs did not produce evidence to prove the applicability of FSIA exceptions is untrue.

REASONS FOR DENYING THE WRIT

I. There is No Conflict Between the *Brown/Aldy* Decisions and Any Other Courts of Appeal.

There is no conflict between the *Brown* and *Aldy* decisions and decisions of the Courts of Appeal for the Second and Ninth Circuits. VPI misrepresents that the *Brown* decision is in direct conflict with several decisions of the United States Court of Appeals for the Ninth Circuit. *See Joseph v. Office of the Consulate General, supra.* The *Joseph* court, on which petitioners rely, requires the party claiming immunity to rebut the evidence propounded by the plaintiffs/respondents by a preponderance of the evidence. *See Joseph* at 1021. The record reflects abundant evidence presented by plaintiffs/respondents that FSIA exceptions to immunity apply. A reading of the opinions entered by the United States Court of Appeals for the Fifth Circuit and by the district courts reveal that plaintiffs/respondents sustained their

burden by presenting evidence that FSIA exceptions apply and that VPI chose to ignore this substantial evidence.

The *Joseph* case is instructive with regard to the Fifth Circuit's rulings. In *Joseph, supra,* the Ninth Circuit concluded that three (3) exceptions to the FSIA applied: (a) the waiver exception; (b) commercial activities exception; and (c) the tortious activities exceptions. All three (3) of these exceptions are applicable to the current case. Because of the ample evidence that these exceptions to immunity under the FSIA exist in the record before this Court, there is absolutely no conflict between the Fifth and Ninth Circuits with regard to the specificity requirements as petitioner urges. Therefore, this Court should deny the Petition for Writ of Certiorari and sanction petitioners for their vexatious abuse of the United States court system.

Petitioner's allegations that the *Brown/Aldy* decisions conflict with the Second Circuit's decision in *Filus v. Lot Polish Airlines, supra,* is also untrue. First of all, in *Filus,* the Second Circuit reversed the district court's dismissal of plaintiff's lawsuit and ordered the foreign sovereign to participate in discovery. *Filus,* at 1332.

Secondly, with regard to the "failure to warn" claim, the substantial evidence in the record establishes that plaintiffs/respondents' claims are based upon VPI's activities which occurred outside and inside the United States ***and*** which caused a direct effect on the United States. As pointed out by the Fifth Circuit (and implicitly recognized by *Filus,* at 1333), an omission which occurs outside the United States but which causes a direct effect comes within the third clause of 28 U.S.C. § 1605(a)(2).

II. The Record Establishes That Exceptions to the FSIA Exist.

The record before this Court establishes that VPI received fair notice of the activities upon which subject matter jurisdiction of the district court is premised. The plaintiffs/respondents were only made aware of VPI's status as a foreign sovereign when VPI filed its motion to dismiss. Needless to say, VPI never disclosed, while negotiating for the sale and installation of its paper winder at the Moss Point mill, that it did not consider itself to be subject to suit in the United States of America. To the contrary, VPI agreed to indemnify and save harmless IP and its employees for all injuries and damages. (R. 113). Once plaintiffs/respondents were made aware that VPI considered itself to be immune pursuant to the FSIA, plaintiffs/respondents submitted substantial evidence which established that a number of exceptions to sovereign immunity applied in this case. "When a party challenges subject matter jurisdiction, the court is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue." *Moran v. Kingdom of Saudi Arabia*, 27 F.2d 169, 172 (5th Cir. 1994). From the pleadings, interrogatories and other discovery, VPI was ably informed of the activities upon which subject matter jurisdiction of the Court is premised and the decisions of the district courts and appellate courts are correct.

III. Case Law Supports the *Brown/Aldy* Decisions.

It is uncontradicted that VPI was engaged in commercial activities which caused Mr. Brown's injuries. The district court made a factual determination that VPI's activities came within the commercial activities exception of 28 U.S.C. § 1605(a)(2). In *Ohntrup v. Fire Arms Center, Inc.*, 516 F.Supp. 1281, 1287 (E.D.Pa. 1991), *aff'd* 760 F.2d 259 (3rd Cir. 1985), plaintiffs filed a lawsuit under theories of warranty, products liability and negligence for injuries sustained when a gun plaintiff was using malfunctioned. A foreign state manufactured and sold the gun in Turkey. The foreign state argued that its activities did not have substantial contact with the United States. The Third Circuit held that the sales agreement indicated that injury in the United States of a purchaser of a defective gun was both a substantial foreseeable consequence of the foreign state's actions. *See Republic of Argentina v. Weltover*, ___ U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) ("When a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA." 119 L.Ed.2d 394, 405.); *Vermuelen v. Renault USA, Inc.*, 985 F.2d 1534 (11th Cir. 1993) (products liability action against the French manufacturer of an automobile for injuries alleging defective design and manufacture, holding that the foreign state's actions in designing and manufacturing an automobile restraint system come within the commercial activities exception of the FSIA.) Without question, VPI comes within the enumerated exceptions of the FSIA. Its Petition for Writ of Certiorari is frivolous, as has been its prior

motions, and this matter is ripe for disposition at the trial level.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

This the 2nd day of July, 1996.

Respectfully submitted,

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(3)

No. 95-1947

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On Petition for a Writ of Certiorari to
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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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THE FACT THAT THE *ALDY* AND *BROWN* DECISIONS ARE IN IRRECONCILABLE CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS IS INDISPUTABLE

Respondents, in their effort to avoid Supreme Court review of the *Aldy* and *Brown* decisions, make the incredible argument that there is no conflict between these decisions and the decisions of other Courts of Appeals. (Respondents' Brief at 6.) The conflicts, however, are direct and irreconcilable.

A. The *Aldy* and *Brown* Decisions Conflict with the Second Circuit's Holding that an Omission is Not an Act Under the FSIA.

In both *Aldy* and *Brown*, the plaintiffs base their jurisdictional claims in part on vague allegations of failure to act, including failure to warn. The Fifth Circuit, in *Aldy*, specifically held that "an omission is an act" within the meaning of the FSIA. (App. 11a.)[1/]

The Second Circuit reached the opposite conclusion in *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990).[2/] The Second Circuit expressly held that "a failure

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1/ In *Brown*, the Fifth Circuit in turn relied on and adopted the *Aldy* decision.

2/ The Second Circuit in *Filus* reversed the District Court but specifically addressed and agreed with the District Court's finding that "it is hard to see how a failure to act can be deemed an act." *In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84, 87 (E.D.N.Y. 1989).

to warn does not constitute an 'act...'" under the commercial activity exception of the FSIA.

The result is a conflict between the Fifth Circuit and the Second Circuit on the issue of whether an omission may be deemed an act for purposes of jurisdiction under the FSIA. The conflict between the Fifth Circuit and Second Circuit on this issue is obvious, direct and irreconcilable. Therefore, a Writ of Certiorari is warranted to resolve this conflict.

B. The *Aldy* and *Brown* Decisions Conflict with the Ninth Circuit's Decision Requiring the Plaintiff to Produce Evidence, Not Just Mere Allegations, to Show the Applicability of an Exception to the FSIA.

In *Aldy*, the Fifth Circuit held, as grounds for denying Valmet's summary judgment motion, that mere allegations of negligent design or manufacture "are sufficient enough to confer subject matter jurisdiction" under the FSIA. (App. 10a-11a.) Similarly, in *Brown*, the Fifth Circuit approved pleadings that merely provide the foreign sovereign with "fair notice" of the claims. (App. 17a.) This expansion of Federal court jurisdiction is in direct conflict with the decisions of the Ninth Circuit which require specific evidence of jurisdiction, not mere allegations.

The Ninth Circuit held that the plaintiff must produce evidence, not merely assert allegations, to show the applicability of a specific exception to the FSIA. *See Joseph v. Office of the Consulate General*, 830 F.2d 1018,

1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), (only after the "plaintiff offers *evidence* that an exception to the FSIA applies, [does] the party claiming immunity bear the burden of proving by a preponderance of the evidence that the exception does not apply") (emphasis added). *See also DeBlake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992); *Schoenberg v. Exportadora del Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991). In product liability actions like *Aldy* and *Brown*, this requires evidence of a specific injury-causing defect in a product.

The conflict between the Fifth Circuit and Ninth Circuit is obvious, direct and irreconcilable. Therefore, a Writ of Certiorari is warranted to resolve this conflict.

C. The *Brown* Decision Approving *In Globo* Pleading Conflicts with the Decisions of Several Circuits Requiring Proof of Specific Conduct by the Foreign Sovereign.

In *Brown*, the Fifth Circuit approved generic pleading, which it labelled *in globo* pleading, as sufficient to strip a foreign sovereign of the immunity granted by Congress through the FSIA. (App. 17a n.10.)

Prior to *Brown*, it was well established that unless and until plaintiff presented evidence that there was an identifiable nexus between the specific conduct at issue and the sovereign's commercial activity, jurisdiction under the FSIA would not lie.

The Ninth Circuit requires the plaintiff to establish a causal nexus between the plaintiff's claim and specific

commercial activity by the foreign sovereign. *See Compania Mexicana de Aviacion v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988); *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793, 796 (9th Cir. 1989). The D.C. Circuit requires the plaintiff to establish that there is a direct causal connection between the specific claim and specific commercial activity of the foreign sovereign. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513-14 (D.C. Cir. 1988). The Sixth Circuit requires the plaintiff to establish that its claimed injury was a direct, foreseeable result of specific acts by the foreign sovereign. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452-53 (6th Cir. 1988). The Third Circuit requires the plaintiff to establish a substantive connection between the plaintiff's cause of action and specific commercial activity of the foreign sovereign. *Federal Ins. Co. v. Richara I. Rubin & Co., Inc.*, 12 F.3d 1270, 1288 (3d Cir. 1993).

Thus, each of these circuits requires plaintiffs to establish (1) the specific injury-causing defect and (2) a direct nexus between the injury-causing defect and specific commercial activity of the foreign state. The *Brown* decision eliminates this prerequisite to jurisdiction and accepts in lieu thereof *in globo* allegations of alleged wrongdoing by a collective group of defendants with no proof of a specific injury-causing defect. In light of the numerous conflicts created by the Fifth Circuit's decisions in *Brown* and *Aldy*, petitioners submit that a Writ of Certiorari should be granted to resolve these conflicts.

THE MERE ENGAGEMENT IN COMMERCIAL ACTIVITY DOES NOT CREATE JURISDICTION UNDER THE COMMERCIAL ACTIVITIES EXCEPTION

Respondents also argue that the commercial activity exception must apply in *Brown* because VPI has engaged in commercial activity alleged to be related to the equipment involved in Respondents' accident. This argument -- that mere commercial activity is sufficient to confer jurisdiction -- is contrary to Congress' express mandate in enacting the FSIA and contrary to the plain language of the FSIA. It is well established that merely engaging in commercial activity, either in the United States or abroad, does not create jurisdiction under the FSIA. *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793, 796 (9th Cir. 1989) ("The fact that the Republic of Ireland carries on commercial activities in the United States is, in itself, insufficient to create jurisdiction ..."). Respondents' erroneous argument, however, is a natural consequence of the Fifth Circuit's rulings in *Aldy* and *Brown*, and demonstrates the compelling need for this Court to grant the Petition for Writ of Certiorari to correct the *Aldy* and *Brown* decisions which undo twenty years of FSIA jurisprudence.

The jurisdictional analysis advanced by Respondents and established by *Aldy* and *Brown* fails to give effect to, and indeed omits, Step-One of the jurisdictional analysis mandated by the FSIA. Step-One under the FSIA requires the District Court to identify the specific conduct on which the action is based. *Saudi Arabia v. Nelson*, 507 U.S. 349,